as the deposit has produced. There will be a formal account on this footing. Upon the plaintiff paying to the defendant what shall be certified to be due to him, within one month of the Registrar's certificate, the defendant must reconvey the mortgaged property. I need not deal with any other part of the decree (such minutes are to be submitted) except the Order with reference to costs. A mortgagee is entitled by contract to all the costs of a redemption suit unless by signing against the terms of that contract he has merited the condemnation of the Court. In such a case he forfeits his own costs and may be made to pay those of the mortgagor. An order of this sort has been made where a mortgagee refused an offer rightly made to redeem him. See *Squire* v. *Pardoe* (1891 W.R. 100). Other authorities are *Charles* v. *Jones* (33 Ch. D. 84), *Heath* v. *Chinn* (98, L.T. 855), *Rourke* v. *Robinson* ([1911] Ch. D. 480) and *Graham* v. *Seal* (L.T. Vol. 119, 526). Having regard to these cases I feel constrained to order the defendant to pay the costs of this action

Judgment accordingly.

Solicitors: *Allen & Gledhill; Donaldson & Burkinshaw.*

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[135] F.M.S. REPORTS

SOCKALINGAM CHETTY v. NAGAPPA PILLAY

[A.C.J. (Aitken J.) February 28, 1936]

[Negri Sembilan Magistrate's Civil Appeal No. 25 of 1935]

Civil Procedure Code (Cap. 7), s.241 — Decree satisfied out of Court — Payment not certified or recorded.

It is not open to the Court to enquire into the fact of payment of a decree not certified or recorded as provided in section 241 of the Civil Procedure Code even though fraud is alleged on the part of the judgment creditor.

M. E. A. Farr for the appellant.

E. Jeff for the respondent.

Aitken J.: Section 241 of the Civil Procedure Code provides that a payment which has neither been certified by the judgment creditor nor recorded by the Court at the instance of the judgment debtor, shall not be recognised as a payment of the decree by the Court executing the same. This section has frequently been considered by the Indian Courts, and it seems to have become settled law that the Court is bound to refuse to inquire into any alleged payments which are uncertified and unrecorded, even though fraud is alleged on the part of the judgment creditor. In other words the section must be taken to mean what he says, and the language in which it is couched is clear and uncompromising.

Now in this matter the learned Magistrate not only investigated an alleged payment by the judgment debtor which was neither certified nor recorded, but proceeded to accord it full recognition and to refuse the judgment creditor's application for an order that the decree in question should be executed. In doing so he acted contrary to the express terms and provisions of section 241 of the Civil Procedure Code, and since the judgment debtor could only advance the alleged uncertified and unrecorded payment as a reason why the decree should not be executed, I think the learned Magistrate should have made an order for it to be executed.

This appeal is therfore allowed, and the matter remitted to the Court of the First Magistrate at Seremban for an order to be made that the decree in question be executed.

As the point on which the decision of this appeal has turned was not included in the Memorandum of Appeal, and was taken by the Court, there will be no order as to costs.

Appeal allowed.

DEWANI BIN KULOP WAKANG v. MUNAH BINTI NGAH BEDAHU

[A.C.J. (Howes J.) February 7, 1936]

[Perak Civil Application No. 21 of 1935]

Land Code, ss.107 and 237 — Appeal from Collector — Jurisdiction of Collector under s.107.

Appeals under sub-section (xii) of section 107 of the Land Code, 1926, are governed by section 237.

When a transfer, voluntarily executed, has been registered, section 107 of the Land Code, 1926, does not confer jurisdiction upon a Collector to adjudicate upon allegations made by the transferor that there has been undue influence or that the transfer should be rescinded on account of an alleged oral agreement to vary it or that there has been a breach of trust. In such cases the remedy of the transferor is to bring a suit for rescission of the contract of transfer.

S. B. Sinha for the appellant.

J. S. Chabra for the respondent.

Cur. Adv. Vult.

Howes J.: This is an appeal by way of petition against the decision of the Collector of Land Revenue, Parit, by which he ordered:

"Entry Mukim Register No. 1505 Mukim of Laiang Laiang to be registered in the name of Munah binti Dahu."

The petition was headed "Petition under section 237(iii) of the Land Code, 1926," and an objection was taken by counsel for the respondent that as the matter was dealt with by the Collector under section 107 the proper course was by way of appeal under section 107(xii).

Section 107(xii) however merely says: "From any order under this section.....an appeal shall lie to the Court." It does not "specifically prescribe" any other form of appeal, and consequently, it appears to me that appeals under section 107(xii) are to be governed by section 237, which is the section dealing with appeals under the Land Code, generally. The period during which a dissatisfied person may appeal under both sections is the same, viz. 30 days. I therefore see no substance in the objection.

The grounds of appeal shortly are:—

(a) The Collector had no jurisdiction to entertain the application of the respondent.

(b) Even if he had jurisdiction he had no power to sit as a Court and set aside transfers on the ground of undue influence or breach of conditions, as such can only be exercised by a Court competent to enforce the provisions of the Contract Act and Specific Relief Act.

(c) The Collector was wrong in admitting oral evidence to depart from the terms as laid down in the transfer.

[136] [136] Two transfers were made by the respondent (who is the wife of the appellant) to the appellant and in each case the consideration was stated to be "love and affection towards my husband." The transfers contain the usual certificate by the Assistant Collector of Land Revenue, Parit, that the transferor was of full age, and had voluntarily executed the instrument.

The husband (the appellant) was accordingly registered as the owner of both plots. No caveat was lodged, nor was there any indication of any trust. Subsequently, the husband sold one of the plots (E.M.R. 759) and consequently the Collector made no order as to this plot.

The respondent at the inquiry before the Collector under section 107, gave evidence that she only transferred the lands to her husband subject to certain verbal conditions, viz.:

(a) The husband must divorce his second wife.

(b) The husband must not marry whilst she (the respondent) is his wife.

(c) The land is not to be transferred without her permission.

(d) The land to remain her property during her lifetime.

The Collector accepted this evidence (the appellant does not appear to have been cross-examined as to the alleged conditions) and on the strength of it, ordered that Entry Mukim Register No. 1505 should be registered in the wife's name, instead of that of the appellant, who at the time was the registered proprietor. In his order, the Collector said, "The husband appears to be very intelligent and is in a position to dominate his wife to execute the transfers."

It is from this order that the appellant appeals.

In view of the decision of the Court of Appeal in *Alang Said* v. *Kulop Hamid* 6 F.M.S. L.R. 108 that evidence of an oral agreement to vary a written transfer is not admissible, and that such evidence must be disregarded, I consider that the Collector was wrong. To admit such evidence, would be to defeat the object of land registration, especially as the Land Code provides machinery for the recognition of trusts. In effect, the wife's case before the Collector was, that the husband held the land subject to the four conditions, or in other words "as trustee," which, if this were true, could, under section 160 of the Land Code, have been provided for, by inserting the words "as trustee" in the transfer, or the woman could have lodged a caveat.

Instead of adopting such a course, the woman transferred the land to her husband absolutely, and free from any condition, and she acknowledged before the Collector that she had done so voluntarily, and presumably the Collector was satisfied as to this point, at the time of the transfer.

Whilst section 107 of the Land Code is somewhat vague, I do not think it is within the jurisdiction of the Collector to adjudicate under that section upon such matters as undue influence (the existence of which the Collector seems to have inferred), or to rescind a contract of transfer on the strength of an alleged agreement to vary it, or to adjudicate upon an alleged breach of trust. In such cases, the proper remedy of the respondent was to bring a suit for rescission of the contract.

I therefore allow the appeal and set aside the order of the Collector of the 2nd November, 1935.

I make no order as to costs.

Liberty to the respondent to institute a suit to set aside the transfer, if she so desires.

Appeal allowed.

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[137] PRIVY COUNCIL REPORTS [137]

ANTONIO DIAS CALDEIRA v. FREDERICK AUGUSTUS GRAY

[P.C. (Lords Alness and Maugham and Sir Sidney Rowlatt) February 14, 1936]

[Privy Council Appeal No. 31 of 1934]

Practice — Appeal — Trial by Judge without jury — Finding of fact — Power of Appellate Court to review decision — Witness — Questions of credibility — Functions of Appellate Court.

Evidence — Expert witnesses — Conflicting testimony — Assessment of relative value of — Principles.

Where the appellant is exercising a right of appeal which is his by right, the Appellate Court cannot, merely because the question is one of fact, and because it has been decided in one way by the trial Judge, abdicate its duty to review his decision, and to reverse it, if it deems it to be wrong. Nonetheless, the functions of a Court of Appeal, when dealing with a question of fact, and a question of fact in which questions of credibility are involved, are limited in their character and scope.

In an appeal from the decision of a trial Judge based on his opinion of the trustworthiness of witnesses whom he has seen, the Court of Appeal must in order to reverse, not merely entertain doubts whether the decision below is right but be convinced that it is wrong.

In assessing the relative value of the testimony of expert witnesses, as compared with witnesses of fact, their demeanour, their type, their personality, and the impression made by them upon the trial Judge — e.g. whether they confined themselves to giving evidence, or acted as advocates — may powerfully and properly influence the mind of the Judge who sees and hears them in deciding between them. These advantages, which are available to the trial Judge, are denied to the Court of Appeal.

PRIVY COUNCIL. — Appeal from the Supreme Court of Trinidad and Tobago.

D. N. Pritt and *Ronald Smith* for the appellant.

J. H. Wallington and *Reginald J. White* for the respondent.

Cur. Adv. Vult.